No. 89-278

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

DAVID FOSTER KENNISON
WILLIAM ROBERT BLACK,
Petitioners,

v.

BETI HOLCOMBE,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals for the State of South Carolina

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REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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REASON FOR GRANTING THE PETITION

The Petition Presents A Substantial Federal Question

It is "conceded" by Respondent, as asserted by Petitioners, that, "if indeed the Petitioners were sentenced under the state's statutory authorization for the imposition of a maximum sentence of one year by the Family Court, and not under its inherent powers, *Taylor* [v.

Hayes, 418 U.S. 488 (1974)[1]] leaves open the question of the remediation of the sentence or outright reversal as an appropriate remedy." Respondent's Opposition To The Petition For a Writ of Certiorari (hereinafter, "Opposition"), at 7-8. This concession reiterates Respondent's earlier statement that *Taylor* "does indeed leave open the question whether a state may set aside an invalid sentence for contempt in the face of a criminal contempt statute allowing a longer sentence." Opposition, at 6.

The sole genuine contention advanced by Respondent in opposing the Petition is that it "is subject to doubt" whether Petitioners "were cited under the statutory authority provided the Family Court for the imposition of the one-year sentence at issue here. . . ." Opposition, at 4.[2]

To support her contention, Respondent points only to the Court of Appeals' citation to, and quotation from, *Curlee* v. *Howle*, 277 S.C. 377, 287 S.E.2d 915 (1982). In fact, the Court of Appeals' citation to *Curlee* does not raise any doubt since the Court of Appeals was only using language from *Curlee* (277 S.C. at 384, 287 S.E. 2d

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[1] "[*I*]*n the absence of legislative authorization* of serious penalties for contempt, a State may choose to try any contempt without a jury if it determines not to impose a sentence longer than six months." 418 U.S. at 496 (emphasis added).

[2] Respondent also argues that the Court of Appeals acted properly in vacating only the Petitioners' sentences, but not their convictions, based upon what she terms "the 'well settled practice' in South Carolina to affirm the conviction and set aside the sentence," Opposition, at 6, and upon her reading of *Bloom* v. *Illinois*, 391 U.S. 194 (1968). Opposition, at 5-6. While Petitioners dispute Respondent's reading of *State* v. *Gregory*, 198 S.C. 98, 16 S.E. 2d 532 (1941) (case remanded for resentencing where sentence was abuse of discretion) and her understanding of the rational of *Bloom*, Petitioners will not respond to Respondent's arguments at this time since the proper place for such a discussion is in briefs on the merits should this Court grant this petition.

at 919) to support its (correct) conclusion that, unlike in *Curlee* (where, after a discussion of the distinction between criminal and civil contempt, the contempt was determined by the court to be civil), Petitioners' contempt "constituted criminal contempt and not civil contempt. . . ." Appendix to Petition (hereinafter, "App.") 3a. That discussion of the distinction between criminal and civil contempt was the only purpose of its reference to *Curlee* is confirmed by the fact that the Court of Appeals also referred to *Checker Yellow Cab Co.* v. *Checker Cab and Parcel Service*, 287 S.C. 608, 340 S.E.2d 549 (Ct. App. 1986) and to *Shillitani* v. *United States*, 384 U.S. 364 (1966) immediately following its citation to *Curlee* and *Shillitani*, and both *Checker Yellow Cab Co.* and *Shillitani* dealt with the distinction between criminal and civil contempt.[3]

It is thus evident, when taken in conjunction with the Court of Appeals' citation of Section 20-7-1350, Code of the Laws of South Carolina, and the fact that the Court of Appeals at no time even mentioned "inherent powers," that the Court of Appeals (like the Family Court, which had sentenced Petitioners to precisely the maximum sentence allowed by Section 20-7-1350) viewed Section 20-7-1350 as the authority for the Family Court's sentence.

CONCLUSION

Because it is plain that Petitioners were sentenced pursuant to a state statute which allowed the imposition of a sentence of one year, but were not accorded a jury trial, and Respondent concedes that this Court has not established whether a jury trial must be accorded in such circumstances, this Court should grant this petition to

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[3] Notably, the page in *Curlee* cited by the Court of Appeals is the *Curlee* court's discussion of *Shillitani*.

resolve this important and substantial question of federal constitutional law.

Respectfully submitted,

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